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In the Supreme Court of the United States

OCTOBER TERM, 1972

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE MAGNAVOX COMPANY OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE MAGNAVOX COMPANY OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, *infra*, pp. 13–15) is reported at 474 F. 2d 1269. The decision and order of the National Labor Relations Board (Pet. App. C, *infra*, pp. 18–49) are reported at 195 NLRB No. 40.

JURISDICTION

The judgment of the court of appeals (Pet. App. B. *infra*. p. 16) was entered on March 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

employees to pass out union literature at the entrances to the Company's premise, rather than on the premises themselves. (Pet. App. C, *infra*, p. 37; A. 21–22.)

On May 21, 1970, however, the Union requested permission to distribute a union leaflet at the time-clock. On June 25, 1970 the Union requested in writing that the rule be revoked to permit employees to distribute literature on Company property. The Company refused both requests (Pet. App. C, *infra*, 38, 246; A. 23).

The Board found that in the collective bargaining agreement, the Union had acquiesced in a Company rule which nullified the employees' right, guaranteed by Section 7 of the National Labor Relations Act, to distribute union literature during nonworking hours in nonworking areas of the plant. The Board concluded that such Union action was invalid, since it unduly interfered with the employees' right to select or reject a bargaining representative and to be fully informed in other matters related to the exercise of their Section 7 rights, and that the Company violated Section 8(a)(1) of the Act by enforcing its overly broad rule. The Board followed its earlier decision in *Gale Products, Inc.*, 142 NLRB 1246, where it stated (at 1249):

> The validity of a contractual waiver of employee rights must depend * * * upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver. Upon consideration of all the relevant factors, we are persuaded that, in the circumstances of this case, an unlim-

> ited contractual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act.
>
> Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees * * *.

The Board ordered the Company to cease and desist from maintaining or enforcing any rule which prohibits employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization, relating to the selection or rejection of a labor organization as the exclusive bargaining representative of the employees or other matters related to the exercise by employees of their Section 7 rights.[3] (Pet. App. C, *infra*, pp. 25, 47–48.)

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[3] In *Gale Products*, the Board had held that, although an incumbent union could not waive the employees' right to solicit on behalf of a rival union, it could waive their right to solicit on its own behalf; hence, it merely ordered the employer to cease and desist from prohibiting the distribution of literature on behalf of a labor organization other than the contracting union. In the instant case, the Board, finding no basis in the Act for according more protection to "employees who wish to exercise their Section 7 right to *reject* a union representative" than to "employees who wish to exercise the same Section 7 right to *support* a union representative" (Pet. App. C, *infra*, p. 23), entered an order which covered distribution of literature on behalf of any labor organization.

B. THE COURT'S DECISION

The court below held that substantial evidence supported the Board's factual findings.[4] But it followed its previous decision in *Armco Steel Corp.* v. *National Labor Relations Board*, 344 F. 2d 621, that a "bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here" (Pet. App. A, *infra*, p. 15). It thus denied enforcement of the Board's order.

REASONS FOR GRANTING THE WRIT

1. As the court of appeals recognized (App. A, *infra*, p. 14), its holding that a union may contractually waive the employees' right to distribute union literature during nonworking hours in nonworking areas of the plant directly conflicts with *Int'l Ass'n of Machinists and Aerospace Workers, District No. 9* v. *National Labor Relations Board*, 415 F. 2d 113 (C.A. 8). It also conflicts with *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702, 704–706 (C.A. 5). In those cases, the Eighth and Fifth Circuits upheld the Board's position that the right to distribute union literature is of such fundamental importance to the individual employees that it cannot be waived by their union representative.[5]

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[4] Thus, it rejected the Union's contention that the contractual provision permitting the Company to issue rules and regulations did not constitute a waiver of the employees' statutory right to distribute union literature (Pet. App. A, *infra*, p. 15).

[5] In *Mid-States Metal*, the Fifth Circuit accepted the Board's then current view that the waiver was invalid only when applied to activities, carried on in opposition to the incumbent union. In

In the *Machinists* case, the court held that "the Union cannot totally waive the employees' rights to distribute literature in nonwork areas of the Company during nonwork time" (415 F. 2d 115). The court stated (*ibid.*) that it was "follow[ing] the Fifth Circuit['s]" holding in *Mid-States* that "the right to distribute literature is a personal right which cannot be waived by a union," and it noted (*ibid.*) that "conflicting results" had been reached by the Sixth and Seventh Circuits. In addition to its decision in the present case, the Sixth Circuit also upheld the union's authority to waive employees' right to distribute literature in *Armco Steel Corp.* v. *National Labor Relations Board*, 344 F. 2d 621 and *General Motors Corp.* v. *National Labor Relations Board*, 345 F. 2d 516. The Seventh Circuit so held in *National Labor Relations Board* v. *Gale Products*, 337 F. 2d 390 (C.A. 7); see, also, *United Steelworkers* v. *National Labor Relations Board*, and *Armco Steel Corp.*, 377 F. 2d 140 (C.A. D.C.).

The question whether a union may, by contract, waive the employees' right to distribute union literature, or solicit union membership, during nonworking time in appropriate areas of the plant has been a recurrent problem before the Board and the courts of appeals. In addition to the cases discussed *supra*, see *General Motors Corp.*, 158 NLRB 1723; *H & F*

Machinists, the Eighth Circuit held that the waiver was invalid even insofar as it applied to support of the incumbent union (415 F. 2d at 115–116), a view which the Board has adopted here.

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Binch Co., 168 NLRB 929, 935; *Armco Steel Corp.*, 183 NLRB No. 26, 74 LRRM 1599, reversed on reconsideration, 184 NLRB No. 109, 74 LRRM 1695. Cf. *United Aircraft Corp.* v. *National Labor Relations Board*, 440 F. 2d 85, 96 (C.A. 2). The conflicting decisions of the courts of appeals have created an uncertainty and a lack of uniformity in this area which impede the effective administration of the Act, and which require resolution by this Court.

2. Section 7 of the Act guarantees to employees the right "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing," as well as the right "to refrain from any or all of such activities." This guarantee encompasses the right to make a free choice respecting the selection or retention of a bargaining representative, and such freedom in turn presupposes that the employees are adequately informed on matters relevant to that choice.

The plant is the "place uniquely appropriate" (*Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 801, n. 6) for employees to obtain this information from their fellow emplyees. Thus, in *Republic Aviation*, the Court sustained the Board's conclusion that a ban on the distribution of union literature, or on the solicitation of union membership, by employees at the plant during nonworking time was an interference with the employees' right to organize, guaranteed by Section 7. Hence, such a ban "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory

in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline" (324 U.S. at 803–804, n. 10).

To be sure, in the collective bargaining agreement the union may not only make rational distinctions among the employees in terms of wages and other conditions of employment,[6] but may waive certain of the employees' statutory rights, such as their right to strike and their right to bargain about subjects within the area of mandatory bargaining.[7] The rationale for permitting waiver by the union of these matters is that "it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to employees." *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702, 705 (C.A. 5). But, as the Fifth Circuit added (*ibid.*):

> The rights to distribute materials and solicit in organizing for collective bargaining are rights of individual employees, relating to their selecting (or choosing not to select) and constantly re-evaluating their collective bargaining agent. They are to be distinguished from rights which employees acting in concert, through the collective bargaining agent, may exercise in attempts to achieve economic advantage * * *.

---

[6] See *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338.

[7] See *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 279–284; *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 750–751 (C.A. 6), certiorari denied, 376 U.S. 971; *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956, 958–959 (C.A. 5), certiorari denied, 350 U.S. 836.

That is, the right to choose or change a bargaining representative is not dependent upon collective action for its effectiveness, but can be exercised by each employee individually. Moreover, it is a fundamental freedom which the individual possessed prior to the selection of a representative, and it is important to him that it not be diminished by such selection, particularly since the employee's interest may not always coincide with that of the incumbent representative. Accordingly, the Board was reasonable in concluding that the employees, in initially selecting a representative, may not be deemed to have authorized it to negotiate a contract which waives their right to receive information necessary to enable them intelligently to decide whether the representative should be retained or replaced by another, or whether the employees should forego further representation altogether. The court below, in reaching a contrary conclusion, thus impermissibly intruded upon the Board's function of striking a balance among "conflicting legitimate interests" which will "effectuate national labor policy." *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 96; see also *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PETER G. NASH,
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JUNE 1973.

APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 72-1121

No. 72-1201

On Separate Petitions to Review and On Cross-Application for Enforcement of an Order of the National Labor Relations Board.

THE MAGNAVOX COMPANY OF TENNESSEE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO AND ITS LOCAL 796, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Decided and Filed March 8, 1973.

Before EDWARDS and MCCREE, Circuit Judges and CECIL, Senior Circuit Judge.

PER CURIAM. We consider petitions to review and a cross-application for enforcement of an order of the National Labor Relations Board. The Decision and Order of the Board is reported at 195 N.L.R.B. No. 40. The petitions have been consolidated for hearing and disposition.

The complaint charged that the company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1),

by prohibiting its employees from distributing literature on behalf of the Union during the employees' non-working time in non-working areas of the company's premises. The Board found that for many years the company has maintained a rule prohibiting the distribution of literature on its parking lots and on other company property. Although the Board determined that such a rule is presumptively invalid under the standards in *Stoddard Quirk Manufacturing Company*, 138 N.L.R.B. 651, it observed that the company had interposed as a defense to the complaint the contention that the Union had contractually waived any objection it might have to the no distribution rule.

It then determined that the Union could not contractually agree to the prohibitions of the no-distribution rule to restrict the dissemination of literature in opposition to any labor organiation or on behalf of any labor organization. In this respect, it amended its *Gale Products* rule[1] and followed the decision of the Eighth Circuit in *Int. Ass'n. of Mach. & Wkrs. Dist. No.* 9 v. *N.L.R.B.*, 415 F. 2d 113 (1969). It

[1] In *Gale Products, Div. of Outboard Marine Corp.*, 142 N.L.R.B. 1246, *enforcement denied* 337 F. 2d 390 (7th Cir. 1964), the Board held that although certain statutory right may be waived by a labor organization on behalf of employees whom it represents, an unlimited contractural prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act to select or reject a bargaining agent. Accordingly, it determined that a bargaining representative could waive solicitation on its own behalf but could not waive the right of employees to solicit on behalf of a labor organization other than the contracting one. Following *Gale* in another case, the Board said, "neither an employer nor an incumbent union is entitled to attempt to freeze out another union by waiving the employees' right to urge a change in their collective-bargaining representative." *General Motors Corporation*, 158 N.L.R.B. 1723, 1726 (1965).

elected not to follow the rule in our circuit enunicated in *Armco Steel Corporation* v. *N.L.R.B.*, 344 F. 2d 621 (1965), and in *General Motors Corporation* v. *N.L.R.B.*, 345 F. 2d 516 (1965). The Board's order required the company to cease and desist from maintaining or enforcing any rule which prohibits distribution in non-working areas on non-working time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining, or other matters related to the exercise of Section 7 rights. It also required posting of appropriate notices.

We determine that substantial evidence on the records as a whole supports the Board's factual findings. However, on a less restricted review we might have found that the contract provision [2] permitting the company to issue rules and regulations did not waive the right to distribute literature even in the context of a preexisting no-distribution rule.[3] Waiver of a right of such importance should be the subject of an express provision.

However, we are not persuaded that our ruling in *Armco Steel* should be overturned at this time, and we adhere to the position that the bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here. The petition of Magnavox to review is granted and the order will be set aside and enforcement will be denied.

Enforcement denied review granted.

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[2] "The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature. . . ."

[3] "You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property."

APPENDIX B

United States Court of Appeals for the Sixth Circuit

No. 72-112

No. 72-1201

THE MAGNAVOX COMPANY OF TENNESSEE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO AND ITS LOCAL 796, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORDER

Before: EDWARDS and MCCREE, Circuit Judges and CECIL, Senior Circuit Judge.

On petitions to review and cross-application to enforce an order of the National Labor Relations Board,

These consolidated causes came on to be heard on the transcript of the record from the National Labor Relations Board and were argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition of Magnavox Company of Tennessee to review is granted and enforcement of the Order of the National Labor Relations Board is denied.

It is further ordered that Petitioner, Magnavox Company of Tennessee, recover from Respondent and Petitioner, International Union, the costs on appeal as itemized below.

Entered by order of the Court.

JAMES A. HIGGINS,
Clerk.

Issued as Mandate: April 12, 1973.
Costs: To be recovered by Magnavox.
Printing brief and appendix, $2,527.54.

ATTEST:
A true copy.

JAMES A. HIGGINS.

APPENDIX C

United States of America before the National Labor Relations Board

Case 10—CA—8555

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO–CLC AND ITS LOCAL 796

DECISION AND ORDER

On April 28, 1971, Trial Examiner Abraham H. Maller issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief. Respondent also filed a brief in reply to the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings,[1] findings, and conclusions and to adopt his recommended Order as modified below.

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[1] In its exceptions, the Charging Party argues that it was error for the Trial Examiner to permit the Respondent to introduce evidence with respect to its "contractual waiver" claim because the Respondent did not allege such a waiver as an affirmative defense in its answer to the complaint. In light of our ultimate decision in this case, we find it unnecessary to pass on this alleged error. We note, however, that neither the Union nor the

1. For many years Respondent has maintained a rule prohibiting the distribution of literature on Respondent's parking lots and on other company property. The Trial Examiner further found that this rule was presumptively invalid under the standards declared in *Stoddard-Quirk Manufacturing Company*[2] and that, as applied to employee distribution of organizational literature in nonworking areas on nonworking time, the rule was not justified by any extraordinary operational or disciplinary needs of Respondent. We affirm these findings.

As noted above,[3] however, Respondent has interposed as a defense to the complaint the claim that the Union had contractually waived any objection it might have to the no-distribution rule. In passing on that claim, the Trial Examiner found that the terms of the collective-bargaining contract between the Respondent and the Union made no explicit reference to the no distribution rule. But, interpreting the contract's terms in light of the historical relationship of the parties, he agreed with the Respondent that the contract implies the Union's acquiescence in the maintenance and enforcement of the rule. We arrive at a similar conclusion in light of the following undisputed facts: (1) The contract terms expressly reserve to the Respondent broad rulemaking powers; (2) the contract clauses currently describing the reserved manage-

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General Counsel claimed surprise at the introduction of this evidence, and that Respondent relied on exhibits introduced by the General Counsel to support its position. Therefore, we do not believe the "waiver of defenses" rule applies to Respondent under these circumstances. Moreover, as the issue of contractual waiver was fully litigated by all parties, the Trial Examiner's ruling is not prejudicial.

[2] 138 NLRB 615, 621.

[3] See fn. 1, *supra*.

ment powers have appeared in all prior contracts of the parties over the 16-year period of their bargaining relationship; (3) the no-distribution rule, as now maintained, was in existence when the first contract between the parties was negotiated and has been in force continuously ever since; and (4) neither the Union nor the employees have heretofore challenged Respondent's right to maintain and enforce the rule, but rather have accepted and obeyed its terms.

2. The Trial Examiner made it clear in his Decision that he would have dismissed the complaint were it not for the inhibiting effect the rule might have on those employees who might wish, during the course of the contract's term, to exercise their basic Section 7 right to oust their bargaining representative. But in deference to *Gale Products*[4] and its progeny, the Trial Examiner (a) found the alleged violation of Section 8(a)(1) of the Act based on Respondent's maintenance of the rule and (b) recommended, as a remedy, Respondent's rescission of the rule to the extent that it forbids the employees' distribution of organizational literature on behalf of any union other than the present incumbent during nonworking time and in nonworking areas.

Respondent, in its exceptions, questions the validity of the *Gale Products* rule and asks us, in effect, to reexamine that rule in light of its rejection by the Court of Appeals for the Seventh Circuit and the subsequent decisions of the Court of Appeals for the Sixth Circuit.[5]

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[4] *Gale Products, Div. of Outboard Marine Corp.*, 142 NLRB 1246, enforcement denied 337 F. 2d 390 (C.A. 7).

[5] *Armco Steel Corporation* v. *N.L.R.B.*, 344 F. 2d 621; *General Motors Corporation* v. *N.L.R.B.*, 345 F. 2d 516.

In *Gale Products*, the Board said, in pertinent part:

> The validity of a contractual waiver of employee rights must depend . . . upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver. Upon consideration of all the relevant factors, we are persuaded that, in the circumstances of this case, an unlimited contractual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act.
>
> Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees. . . . [142 NLRB at 1249.]

These views have since been approved by the Courts of Appeals for the Fifth and Eighth circuits in cases where basically the same issue was involved.*

We have reexamined the Board's holding in *Gale Products* under the additional light cast thereon by these decisions. We are persuaded that we should adhere to what was said in *Gale Products* concerning the consideration to which paramount weight must be accorded in resolving issues of the kind before us here. The Board's judgment, as above expressed, appropriately envisages, so we believe, the Board's performance of the duty imposed upon it by the Act to protect the basic organizational rights granted to individual employees against encroachment by either employers

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* *N.L.R.B.* v. *Mid-State Metal Products, Inc.*, 403 F.2d 702 (C.A. 5); *International Association of Machinists and Aerospace Workers, District No. 9* [*McDonnell Douglas*] v. *N.L.R.B.*, 415 F.2d 113 (C.A. 8).

or unions.[7] But, given the basic premise of *Gale Products* that an overly broad no-distribution rule hampers the Section 7 rights of individual employees to select a bargaining representative—even though that rule is sanctioned by a union-employer contract—we have difficulty in accepting as valid the two-sided remedy fashioned in *Gale Products*.[8] Certainly, we find noth-

[7] We do, of course, acknowledge that, although the right to strike is also protected by the statute, the Supreme Court has held that a waiver of that right in a collective-bargaining agreement is, in normal circumstances, binding on the unit employees involved. However, as the Supreme Court further indicated, the binding effect of such a waiver is subject to the *proviso*, that the "*selection of the bargaining representative remains free. . . .*" *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 280. Analyzing the possible effect of the Supreme Court's decision on the Waiver issue here involved, the Court of Appeals for the Fifth Circuit said in the *Mid-States Metal Products* case, footnote 6, *supra*, 403 F.2d. at 704:

"The Act 'was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the *employees* rather than a grant of power to the union.'

* * * * *

"The rights to distribute materials and solicit in organizing for collective bargaining are rights of individual employees, relating to their selecting (or choosing not to select) and constantly re-evaluating their collective bargaining agent. They are to be distinguished from rights which employees acting in concert, through the collective bargaining agent, may exercise in attempts to achieve economic advantage." [Citations omitted.]

[8] Member Jenkins has heretofore expressed his disapproval of this aspect of *Gale Products* in his dissenting opinion in *General Motors Corporation*, 147 NLRB 509, 514. As set forth hereinafter, Chairman Miller and Member Kennedy agree with Member Jenkins' position.

ing in the statutes to suggest that employees who wish to exercise their Section 7 right to *reject* a union representative are entitled to more protection than employees who wish to exercise the same Section 7 right to *support* a union representative. This was pointed out by Court of Appeals for the Sixth Circuit when it reversed the Board's decision in *Armco Steel*, in which the order was fashioned after that in *Gale Products*. There the court said:

> Under Section 9 of the Act, the collective bargaining representative was the exclusive representative of *all* the employees, which included dissident as well as those who were loyal to the incumbent. It was the Board who divided Armco's employees into two classes and held the collective bargaining agreement invalid as to dissident and valid as to loyal employees supporting the representative. The purpose of the National Labor Relations Act is to promote industrial peace. Policy making decisions of the Board favoring employees supporting a rival union over those loyal to the incumbent would seem to us to have the opposite effect. [344 F.2d at 624.]

The Eighth Circuit, although enforcing our decision in *Machinists* v. *N.L.R.B.*, footnote 6, *supra*, took issue with that part of our order which, out of deference to a bargaining contract's terms, would have subjected employees who chose to support the contracting union to the prohibitions of the no-distribution rule while at the same time exempting dissident employees from such prohibition. The court therefore expressly added

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to our order language that would insure to *all* employees equal literature distribution rights "*on behalf of any labor organization or in opposition to any labor organization.*" (Emphasis supplied.)

Upon due reflection, and with all due respect to the adverse decisions of the Courts of Appeals for the Sixth and Seventh Circuits, we believe the course mapped out for us by the decision of the Eighth Circuit in *Machinists* v. *N.L.R.B., supra,* and earlier suggested by the Fifth Circuit in *Mid-States Metal Products, supra,* best serves to effectuate the fundamental purposes of Section 7 of the Act and the rights it guarantees.

We therefore feel it appropriate to modify the remedy announced in *Gale Products* and followed in related cases, insofar as that remedy prohibits employee distribution of literature by or on behalf of members of an incumbent labor organiation which pertains to: (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) other matters related to the exercise by employees of their Section 7 rights.[9] We shall reframe the remedial order accordingly.

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[9] As our holding is concerned solely with the exercise by *employees* of their Section 7 rights, it is not to be taken as licensing in any way the distribution of institutional—as distinguished from purely organizational—literature of a labor organization which has acquiesced in an employer's promulgation or maintenance of a broad no-distribution rule.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modified below and hereby orders that the Respondent, The Magnavox Company of Tennessee, Greeneville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, with the following modifications:

1. Delete paragraph 1 and substitute the following:

"Cease and desist from maintaining, giving effect to, or enforcing any rule which prohibits employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining, or other matters related to the exercise by employees of their Section 7 rights."

2. Substitute the attached notice for the notice of the Trial Examiner.

Dated, Washington, D.C.

EDWARD B. MILLER,

Chairman.

HOWARD JENKINS, JR.,

Member.

RALPH E. KENNEDY,

Member.

NATIONAL LABOR RELATIONS BOARD.

[SEAL]

MEMBER FANNING, concurring:

Respondent is charged with restraining and coercing its employees in their exercise of Section 7 rights because it has invoked against the Union a long-established rule against distribution of union literature anywhere on its premises. As a defense to the charge, Respondent cites a provision in its collective-bargaining agreement with the Union which states:

> The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with this agreement.

Respondent contends that by agreeing to these provisions the Union has given Respondent the contractual right to promulgate the rule in question and has waived its statutory rights and the statutory rights of its supporters to disseminate union literature on plant premises.

The Trial Examiner, relying on the *Gale Products* decision,[10] found no violation in Respondent's invocation of the rule to ban the Union's proposed distribution, but found a violation in the continued maintenance of the rule insofar as it operated to discourage solicitation and distribution of literature by employees on behalf of another labor organization. He therefore recommended that Respondent be ordered to cease and desist from giving effect to or enforcing any rule which prohibits any employees from distrib-

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[10] *Gale Products, Div. of Outboard Marine Co.*, 142 NLRB 1246, enforcement denied 337 F.2d 390 (C.A. 7).

uting literature during nonworking time and in nonworking areas on behalf of any union other than the incumbent Union.

Quite clearly the Trial Examiner is correct in finding that the mere maintenance of the rule involved herein has an inhibitory effect on the exercise of Section 7 rights by employees who would seek to support another union. He is also correct in holding that, under the *Gale Products* rule, the fact that the incumbent Union has impliedly agreed to such restriction is an insufficient basis for permitting it to remain in effect. However, if we strike down the rule as applied to such activities, we can hardly, on the facts of this case, permit it to stand as a bar to similar activities on the part of the Union or its supporters. This is not a case in which the Union has explicitly agreed not to engage in organizational activities on plant premises. It has agreed only to abide by rules issued by the Respondent for the maintenance of orderly conditions on plant premises provided the rules are not unfair or discriminatory. The Union has not acquiesced in a rule which would be applied against it and its supporters but not against activities in support of another union, for such a rule would be unfair and discriminatory. As Respondent is precluded by law (*Gale Products*) from maintaining the rule in question against distribution on behalf of another union, the contractual provision requiring any rules issued by Respondent to be fair and nondiscriminatory preclude Respondent from maintaining the rule only against the Union. I, therefore, find that Respondent violated Section 8(a)(1) when it refused the Union permission to distribute literature during nonworking time,

and I join my colleagues in striking down the entire rule.[11]

JOHN H. FANNING,
Member, National Labor Relations Board.

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[11] Heretofore, we have dealt with this issue in the context of employer action enforcing an explicit contractual agreement restricting employees' organizational activities against activity in support of a union other than the contracting union. We have not had occasion therefore to consider whether the contractual language sufficed to justify a restriction solely on such activity by the contracting union or its supporters.

I disagree with the order only insofar as it may be read to permit restrictions on the distribution of literature in working areas when work is not being performed in such areas. See my dissenting opinion in *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 625–631.

APPENDIX

NOTICE TO EMPLOYERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT maintain, give effect to, or enforce any rule which prohibits our employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining, or pertaining to other matters related to the exercise by employees of the rights guaranteed to them by the National Labor Relations Act, as amended, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

THE MAGNAVOX COMPANY OF TENNESSEE
(Employer)

Dated ——— By ———
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peachtree Building, room 701, 300 Peachtree Street NE., Atlanta, Ga. 30308, telephone 401–526–5760.

United States of America, Before The National Labor Relations Board, Division of Trial Examiners, Washington, D.C.

Case No. 10–CA–8555

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO–CLC AND ITS LOCAL 796

Alan L. Roolnick, Esq., of Atlanta, Ga., for the General Counsel.

George K. McPherson, Jr., and *James A. Smith, Esqs.* (*Smith, Currie and Hancock*), of Atlanta, Ga., for the Respondent.

Ronald H. Janetzke, Esq., of Kettering, Ohio and *Mr. Richards Fisher*, of Afton, Tenn., for the Charging Party.

TRIAL EXAMINER'S DECISION

ABRAHAM H. MALLER, Trial Examiner: On August 27, 1970, International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC and its Local 796, herein called the Union, filed a charge against The Magnavox Company of Tennessee, herein called the Respondent. Upon said charge, the Regional

Director for Region 10 of the National Labor Relations Board, herein called the Board, issued on behalf of the General Counsel a consolidated complaint against the Respondent. Briefly, the complaint alleged that the Respondent has maintained and enforced in its plant a rule prohibiting the soliciting of any kind on company property during working hours, and on or about May 21, 1970, by maintaining and enforcing said rule, Respondent has prohibited its employees from distributing literature on behalf of the Union during employees' nonworking time in nonworking areas of Respondent's premises, in violation of Section 8(a)(1) of the National Labor Relation Act, as amended (29 U.S.C. Sec. 151, *et seq.*), herein called the Act. In its duly filed answer, the Respondent denied any violations of the Act.

Pursuant to notice, a hearing was held before me at Greenville, Tennessee, on February 9 and 10, 1971. All parties were represented at the hearing and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument and to file briefs with me. Helpful briefs were filed by all parties. Upon consideration of the entire record [1] and the briefs, and upon my observation of each of the witnesses, I make the following:

Findings of Fact

I. The business of the respondent

Respondent is, and has been at all times material herein, a Tennessee corporation with an office and place of business located at Greenville, Tennessee,

[1] Both the General Counsel and the Respondent have filed motions to correct the record in certain particulars. No opposition to said motions has been filed. Upon consideration of the motions, it is hereby ordered that the record be corrected as requested.

where it is engaged in the manufacture and sale of television and sound products. During the calendar year preceding the filing of the complaint herein, which period is representative of all times material herein, Respondent has sold and shipped finished products valued in excess of $50,000 directly to customers located outside the State of Tennessee. Accordingly, I find and conclude that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act for the Board to assert jurisdiction here.

II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUE

Whether the Respondent by prohibiting its employees from distributing literature on behalf of the Union during employees' nonworking time and in nonworking areas of Respondent's premises has violated Section 8(a)(1) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Union was first certified as the collective-bargaining representative of Respondent's employees in the latter part of 1954 or early in 1955. Prior to and at the time of the Union's initial certification, Respondent maintained and had distributed to employees an employee handbook which contained the following statement: "You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property." It is undisputed that the Re-

spondent has at all times treated the foregoing statement as a rule and has prohibited the distribution of notices or handbills with the few exceptions noted *infra*.[2]

Following the Union's certification, the parties entered into negotiations resulting in a collective-bargaining agreement governing wages, hours, and working conditions. This collective-bargaining agreement was effective for a 1-year period commencing on April 30, 1955. During these contract negotiations, the union negotiating committee was headed by one, Edward Lingo, a CIO representative on loan to the Union. It was stipulated by the parties at the hearing that Lingo was instrumental in organizing Respondent's employees and negotiated at least the first two collective-bargaining agreements between the parties, and that in doing so he was acting as agent of the Union.

During the course of the negotiations, the Union proposed a negotiating of the rules and making them part of the contract. The Respondent opposed this and contended that it, alone, should make the rules and the Union should have the right to protest if it felt that the rules were discriminatory. The Union inquired whether the Respondent had any intention of making rules beyond those which were in the employee handbook which was in effect at that time. At a subsequent meeting, the Respondent stated that it had no immediate plans for any change in the rules, but offered a

[2] In another part of the employee's handbook, the Respondent had set forth a section entitled "Plant Rules." One of said rules is the one referred to in the complaint which reads as follows: "The following will not be permitted: . . . 6. Soliciting of any kind on Company Property during working hours." That rule however does not appear to be involved in the instant proceeding.

proposal that it would have the right to make changes when circumstances dictated it. The specific proposal made by the Respondent read as follows:

> The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These plans will not be of a discriminatory nature.

The Union then suggested that there might be rules which might not be discriminatory but would be unfair, and the Respondent agreed to change the language of the last sentence to read: "These rules will not be unfair or of a discriminatory nature." The Respondent's proposal as so modified was accepted and became part of the collective-bargaining agreement (Article XII, paragraph 3).

The initial contract contained a further provision regarding bulletin boards, as follows:

> The Company will provide a Bulletin Board in Plant I and a Bulletin Board in Plant II each of which will be used exclusively for the posting of Union Notices. Such notices must be approved by the Director of Industrial Relations or his designated representative and will be placed on the boards by the Personnel Department. It is understood that such notices will be automatically approved unless they are of a controversial nature. These Bulletin Boards will be labeled "Local 796, IUE–CIO."

There have been six collective-bargaining agreements between the Respondent and the Union. The most recent one was effective July 1, 1968, and is to remain in effect for 3 years, and from year to year thereafter unless notification of termination, modification, or amendment is given by either party as prescribed therein. Each of said agreements has contained a provision giving the Respondent authority to make and enforce rules and regulations and provides

for the maintenance of bulletin boards furnished by the Respondent for the benefit of the Union. All of these provisions are essentially identical to those contained in the 1955 collective-bargaining agreement.[3]

On March 21, 1956, a decertification election was conducted at Respondent's plant. During the campaign preceding that election, Union Representative Lingo telephoned Byron Sites, Respondent's Director of Industrial Relations, and complained that employees opposed to the Union were distributing Literature on Respondent's property, while those supporting the Union were prohibited from engaging in such activity. Sites assured Lingo that he was not aware that this had taken place and that he would take immediate steps to prohibit such action. Lingo confirmed the foregoing telephone conversation by letter dated March 15, 1956, which reads in pertinent part as follows:

> It has been called to our attention that on several occasions handbills have been distributed in the plant by the "Committee for Independent Action."
>
> By the same token, yesterday, employees distributing our handbill have been denied this right. Yesterday, they were driven off company property by one of your plant guards.

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[3] In the most recent agreement, the provision giving the Respondent the right to make rules and regulations reads as follows:

"The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with the terms of this agreement."

The section regarding bulletin boards now provides for one bulletin board in Plant #1, two bulletin boards in Plant #2, and six bulletin boards in Plant # 3.

Please consider this letter a request that our members be allowed an opportunity to distribute handbills in the plant as has our opposition.

On the same day, Sites replied as follows:

In reference to your letter of March 15, any action by any employee in distributing hand bills on Company property was strictly without authorization and in violation of Company rules. Various steps have been taken to prevent such incidents and the following letter today is being addressed to all of our supervision in a further effort to control the matter.

"In this period preceding the election we are faced with the problem of maintaining normal work conditions. It has been called to my attention that people have been bringing in various types of propaganda material and distributing it inside the plant. This is a violation of our rules and must be stopped immediately. If you find any employee engaging in this practice order him to cease immediately and if he fails to abide by your instructions take him to the Personnel Office for disposition of the matter."

We feel that it is improper to permit this type of campaigning within the plant by either party and therefore must refuse your request to permit such distribution.

For more than 16 years, antedating the time of the Union's initial certification to the present, the Respondent has maintained the rule prohibiting all distribution of literature on company property by any persons, including Respondent's employees. Throughout this extended period, the Union has frequently distributed handbills to Respondent's employees as they were coming to or leaving work. The distributors, however, have always stood at the gates off of company property to make their distributions. Through-

out that period, the Union has never filed a grievance protesting the Respondent's no-distribution rule nor has it ever attempted to secure a change of the Respondent's rule through the negotiation process. The Union's officers have always instructed the employees to pass out union literature at the entrances to the Company's premises and not on the premises themselves.

On numerous occasions, civic organizations, political candidates, and local merchants have requested permission to distribute literature to Respondent's employees on its property. These requests have uniformly been denied. The only distribution ever allowed on Respondent's premises occurred in 1965, when the Respondent allowed the Union to distribute a pamphlet to employees. This pamphlet concerned the "City of Hope," a charity supported by the Union. The distribution occured prior to the Union's solicitation for the charity and was allowed by the Respondent only after the president of the local union specifically requested permission to make the distribution. The Respondent also permitted, indeed encouraged, the employees to distribute literature for the United Fund on company time and property. On one occasion, Respondent distributed its monthly magazine to the employees on company property. Respondent also has a newspaper which it publishes every Wednesday. This publication is placed in boxes located throughout the plant. It is not uncommon for employees to pick up a number of the weekly papers and distribute them to fellow workers in the plant.

During the entire time that the Union has acted as the representative of Respondent's employees, the Respondent has never refused a request to post a notice on the bulletin boards allocated for the

Union's use in the plant. On only one occasion in all that time did a question arise concerning the language of a proposed notice, and the Union and the Respondent promptly worked out acceptable language. The Respondent has always cooperated with the Union in ensuring that the notices which the Union wished to have posted were placed upon the bulletin boards immediately.

On May 21, 1970, the Union requested permission to distribute a union leaflet at the timeclock. Permission was denied by the Respondent. On June 25, the Union's counsel in writing requested the Respondent to allow employees to distribute literature in nonwork areas of the plant on the employees' own time. On July 16, Respondent's counsel wrote the Union, pointing out that by virtue of the collective-bargaining agreement the Union had waived its right to distribute literature on company property. The letter further pointed to the existence of the bulletin boards for posting union notices and the further fact that the Respondent had provided the Union with current lists of the names and addresses of its employees.

In rebuttal, the General Counsel produced the following evidence to demonstrate that alternative methods of communication available to the Union are not sufficient for it to communicate with the unit employees and its members for the following reasons: The mailing of leaflets and notices involves a mailing expense of approximately $400 per mailing. Many letters are returned because members do not keep the Union appraised as to changes of address. Door-to-door distribution is impractical because of the great number of employees involved and because employees' residences are scattered over a large area, including some in the State of North Carolina. Plant entrance-exit distribution has proved inadequate because there

is danger that the leaflet distributors may be hit by cars, inclement weather, and the distribution to occupants of automobiles creates traffic jams and hazards, and causes employees to be late for work. Bulletin board posting is not satisfactory because members do not read the bulletin boards. On one occasion, the Union had a leaflet prepared but did not submit it to the Respondent for fear that the Respondent would reject it for posting as being controversial. Communication at monthly union meetings is not satisfactory because attendance at such meetings is light and nonmembers do not attend union meetings.

B. Concluding Findings

There is no question but that the prohibition against the distribution of notices or handbills, set forth in the employee handbook, though expressed as a request, had the force and effect of a rule. It was enforced by the Respondent as a rule, and was accepted and observed by the Union and by the employees as such.

The rule, applicable as it was "in the parking lots or on other Company property," is presumptively invalid. Indeed, the following language of *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 621, is particularly applicable in the instant case:

> . . . the no-distribution rule maintained by the Respondent is presmuptively invalid on its face, as applied to employees who may wish to distribute union literature, since its reach is not limited to working time or to the working areas of the plant. We also find that the presumption of invalidity is not overcome by the testimony of Carson Butcher, Respondent's vice president, that the rule was adopted years age for the purpose of "keep[ing] down the litter . . . [and] fire hazards . . . in the plant." The mere asser-

tion that a broad no-distribution rule has this purpose hardly proves that it is actually "necessary" for the employer to prohibit union handbilling by his own employees in nonworking areas in order to "maintain production or discipline" (*Babcock & Wilcox, supra*). Such necessity has not been shown here.

In the instant case, no evidence of necessity whatsoever has been shown.

Respondent, however, contends that the presumption of invalidity is overcome by the fact that the Union in the first instance and repeatedly thereafter waived any objection to the broad no-distribution rule. Respondent's position has merit and should be sustained. The rule in its present form was in effect when the Union was certified and, in the first and in each of the succeeding collective-bargaining agreements, the Union agreed to a management-prerogative clause giving the Respondent the power to make rules, thereby incorporating by implication the existing rules and giving the Respondent the right to make new rules. That the Union was aware of the broad no-distribution rule when it agreed to the management-prerogative provision is not open to question. Moreover, in the ensuing relationship between the parties over a period of 16 years, the Union acquiesced in Respondent's enforcement of the broad no-distribution rule.

The management-prerogative provision does not stand alone. On its part, the Respondent in the original contract agreed to maintain two bulletin boards (increased to nine in the current agreement) for the Union's exclusive use. Both the provision for the maintenance of union bulletin boards and the provision giving the Respondent the right to make rules are contained in Article XII of the original and succeeding contracts. The juxtaposition of these provisions

is significant. It suggests a *quid pro quo* for the Union's acceptance of the Respondent's right to prohibit distribution of union literature on company property. Cf. *General Motors Corporation,* 158 NLRB 1723, 1727.

That the Union may waive statutory rights is not open to question. Thus it is well settled that a union may waive the right of employees to strike.

The General Counsel and the Charging Party argue that waiver by the Union may not be found to have occurred in this case, because waiver will not readily be inferred, but there must be a clear and unmistakable showing that the waiver occurred, and that the Union bargained away its statutory rights. They rely upon *Beacon Piece Dyeing and Finishing Co., Inc.,* 121 NLRB 953, 956, and a long line of cases implementing this policy. These cases are not controlling. They involve situations in which the collective-bargaining agreement is silent on the rights alleged to have been waived, or where the changes unilaterally effected by the Employer exceeded the powers reserved to him in the collective-bargaining agreement. E.g., *C & C Plywood Corporation,* 148 NLRB 414, 417. Hence, the bargaining negotiations in those cases were examined to determine whether the union had, in fact, bargained away its rights. In the instant case, the waiver was explicit and was set forth in each contract. Even if, *arguendo,* there were any doubt as to incorporation by implication of the existing broad no-distribution rule in the explicit management-prerogative provision, such doubt has been effectively erased by the construction which the parties themselves have placed on the provision. Thus, for 16 years, the parties have consistently interpreted the contracts as prohibiting the distribution of union literature on company

property. As the Supreme Court said in *Insurance Co.* v. *Dutcher*, 95 U.S. 269, 273:

> The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. . . . Parties in such cases often claim more, but rarely less, than they are entitled to.

See, also, *N.L.R.B.* v. *Local 825, Operating Engineers*, 315 F. 2d 695, 699 (C.A. 3), enforcing 135 NLRB 578; *Williston on Contracts*, 3rd ed., Sec. 623, Vol. 4, pp. 789–790.[4]

The record is clear that Respondent's enforcement of the no-distribution rule has not been discriminatorily applied against the Union. It is undisputed that the Respondent has steadfastly refused requests by civic organizations, merchants, and political candidates to distribute literature on its premises. There have been only isolated exceptions: The Respondent on one occasion granted the request of the Union to distribute literature on behalf of the City of Hope, a charitable institution supported by the Union. As this request was made by the Union, the granting of it can hardly be termed discriminatory. Also, as noted above, the Respondent permitted employees to distribute literature and to solicit for the United Fund on company property and time. But as pointed out in *Emerson Electric Co., etc.*, 187 NLRB No. 33, n. 2, isolated instances of permissible solicitation for beneficent causes do not establish disparate application of a rule

[4] While the Union has waived its right to object to the no-distribution rule during the term of the current contract, it is, of course, free to negotiate the entire question of rules when bargaining for a new contract.

prohibiting solicitation. Nor is it significant that the Respondent on one occasion distributed its monthly magazine to employees on company property, and places its weekly newspaper in boxes located throughout the plant where they can be picked up by employees. As the Supreme Court pointed out in *N.L.R.B.* v. *United Steelworkers*, 357 U.S. 357 at pp. 363-364:

> Of course the rules had the effect of closing off one channel of communication; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. Cf. *Bonwit Teller, Inc.* v. *N.L.R.B.*, 197 F. 2d 640, 646; *N.L.R.B.* v. *F. W. Woolworth Co.*, 214 F. 2d 78, 84 (concurring opinion).[5]

In view of the foregoing, as the Union is the charging party in this proceeding, it would be appropriate to recommend dismissal of the complaint, were it not for the fact that the existence of the no-distribution rule would have an inhibiting effect on the employees in the event that some of them might at a future time desire to campaign for the selection of another union as their collective-bargaining representative. As the Board pointed out in *Gale Products, Div. of Outboard Marine Corp.*, 142 NLRB 1246, 1249:

> The validity of a contractual waiver of employee rights must depend, however, upon whether the interference with the employees' statutory rights is so great as to overside any legitimate reasons for upholding the waiver.

[5] There is no evidence, indeed there is not even the suggestion in the record, that the Respondent's literature was anti-union in character as was the case in *United Steelworkers*.

> Upon consideration of all the relevant factors, we are persuaded that, in the circumstances of this case, an unlimited contractual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act.

See, also, *General Motors Corporation, etc.*, 147 NLRB 509.

Following its holding in *Gale* and *General Motors, supra*, the Board said that "neither an employer nor an incumbent union is entitled to attempt to freeze out another union by waiving the employees' right to urge a change in their collective-bargaining representative" *General Motors Corporation*, 158 NLRB 1723, 1726. Accordingly, the Board has sustained the defense of waiver of broad no-distribution rules only insofar as the waiver applied to the distribution of literature by the union.[4] To the extent, therefore, that the rule prohibits the employees from distributing literature, other than that of the Union, during nonworking time and in nonworking areas of Respondent's premises, it is invalid and violates Section 8(a)(1) of the Act, and I so find.

While relying on the foregoing decisions as to the power of the Union to waive its right to distribute

[4] Respondent argues that there is no move at present to unseat the Union as the collective-bargaining representative; hence, there is no necessity to consider the validity of the broad no-distribution rule in a nonexisting context. The absence of a move to unseat the Union is not significant. The Board has in the foregoing cases emphasized its concern for protection of the rights of employees to select and change their collective-bargaining representative. Consequently, it would be inconsistent with established Board policy for the Board, by dismissing the instant proceeding, to place its imprimatur on a rule which would obviously have an inhibiting effect on employees desiring to campaign for another collective-bargaining representative at a future time.

literature on company premises, Respondent asks that I go further and hold that the Union's waiver is complete and should not be limited to the Union *qua* Union, but should apply to all employees. Respondent argues that, as the certified collective-bargaining representative of all employees, the Union had the power to, and did, waive the right of all employees to distribute literature on company premises. Respondent points to the fact that the Court of Appeals for the Seventh Circuit has denied enforcement of the Board's decision in *Gale,* holding the waiver to be complete. 337 F. 2d 390. Respondent also cites the fact that the Sixth Circuit, in whose jurisdiction Respondent's plant is located, has disagreed with the limitation which the Board place upon the no-distribution rule in *General Motors Corporation, etc.,* 147 NLRB 509, 345 F. 2d 516. See, also, *Armco Steel Corporation,* 344 F. 2d 621 (C.A. 6), denying enforcement of 148 NLRB 1179.

The argument is misaddressed to me. As a Trial Examiner of the Board, it is my "duty to apply established Board precedent which the Board or the Supreme Court has not reversed" (*Insurance Agents' International Union,* 119 NLRB 768, 773). The Board has not acquiesced in the foregoing court decisions, but has expressed its respectful disagreement with them. *Armco Steel Corporation,* 183 NLRB No. 26, *General Motors Corporation,* 158 NLRB 1723, 1726; *Armco Employees Independent Federation, etc.,* 155 NLRB 551, 552, enfd. 377 F. 2d 140 (C.A.D.C.). Moreover, there is a conflict between the circuits. The Fifth and Eighth Circuits have agreed with the Board's holdings in this respect. *N.L.R.B.* v. *Mid-States Metal Products, Inc.,* 403 F. 2d 702 (C.A. 5), enforcing 156 NLRB 90; *International Assn. of Mach. & A. Wkrs., Dist. No. 9* v. *N.L.R.B.,* 415 F. 2d 113 (C.A. 8), enforcing 171 NLRB No. 35.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section IV, above, occurring in connection with the operations of the Respondent set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

VI. THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice violative of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing a rule which prohibits employees from distributing literature on nonworking time in nonwork areas, Respondent has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section

10(c) of the Act, I hereby issue the following recommended:[7]

Order

Respondent, The Magnavox Company of Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

Cease and desist from maintaining, giving effect to or enforcing any rule which prohibits any employee from distributing literature in behalf of any labor organization other than International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC and its Local 796, where the activity occurs in nonworking areas on nonworking time.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its plants and office in Greeneville, Tennessee, copies of the attached notice marked "Appendix."[8] Copies of the notice on forms provided by the Regional Director for Region 10, after being duly

[7] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.*

Dated at Wasington, D.C.

ABRAHAM H. MALLER,
Trial Examiner.

* In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT maintain, give effect to, or enforce any rule which prohibits any employee from distributing literature in behalf of any labor organization other than INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO–CLC AND ITS LOCAL 796, where the activity occurs in nonworking areas on nonworking time.

THE MAGNAVOX COMPANY OF TENNESSEE

(Employer)

Dated _____ By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Peachtree Building, Room 701, 730 Peachtree Street NE., Atlanta, Georgia 30308 (Tel. No. 404—526–5760).

U.S. GOVERNMENT PRINTING OFFICE: 1973